IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 733

MCCLATCHY BROADCASTING COMPANY, *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER

In their oppositions, both the Commission and Telecasters contend that the question set forth by petitioner is not, in fact, presented in this case. In so doing, they attempt to mislead this Court, as they successfully misled the court below, into believing that petitioner has not correctly stated the question presented for review. They argue, as they did below, that the Commission did not grant the television license to Telecasters "on the sole ground" that that applicant was free from asso-

ciations with mass communication media, while petitioner had such associations. It is said rather that there were other grounds supporting a grant to Telecasters over McClatchy. The other alleged grounds relied upon are the superiority of Telecasters over petitioner in the areas of local ownership, integration of ownership and management, and participation in community civic affairs. Respondents urge that since Telecasters was awarded preferences in those areas, as well as on the issue of diversification, it is erroneous for petitioner to say that Telecasters won before the Commission "solely" because of its freedom from ties with other media of mass communications. This is but a further attempt to perpetuate an error.

The court below was erroneously led into believing that petitioner herein had not properly stated the question for decision. Thus it did not pass upon the real question for review. The opinion below states that:

> "But, contrary to the assumption in appellant's version of the first question, the Commission did not find McClatchy superior in every area of comparison save that of diversification of facilities for publishing information, and did not deny it the construction permit solely because of its ownership of newspapers and broadcasting stations . . . " (App. 4).
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> "With ample support in the record, the Commission found Telecasters superior to McClatchy as to local ownership, participation in the civic life of the community, and in the integration of ownership with management." (App. 7).

The correctness of the question presented must be determined by what the Commission said in its decision

and not by what either respondents or the lower court say about that decision. In its decision, the Commission compared Telecasters' local ownership, civic participation and integration (which the Commission said are only presumptions that an applicant will effectuate its proposals) with McClatchy's record of performance. On the comparison, McClatchy was awarded the preference. The Commission did not consider local ownership and the other similar presumptive factors *in vacuo*, but compared them to McClatchy's outstanding record "affirmatively demonstrating performance". The court below was led into the error of believing that Telecasters received preferences for local ownership and the other presumptive factors, which simply is not the case.[1] The Commission's decision makes this point clear:

> "If we were to compare the applicants solely on the basis of these criteria—integration of ownership and management, diversity of business background, civic participation and local residence—we would find that Telecasters merits a distinct preference. *However, these factors, as so often stated, are only guideposts or presumptions for determining which applicant is more likely to carry out its proposal and remain alert to the area's needs.* They give assurance that the changing needs of the community will be reflected in the station's programming. *Tampa Times Company,* FCC 54-1132. But, the foregoing factors are less critical or determinative when a record establishing an applicant's past performance is available. *Hearst Radio, Inc.,* 6 RR 994; *WJR, The Goodwill Station, Inc.,* 9 RR

[1] It is significant that neither the Commission nor Telecasters challenged McClatchy's statement that Telecasters' local ownership, civic participation and integration were pitted against McClatchy's record of performance and the award of the preference went to McClatchy. See petition, n. 3.

227. McClatchy has demonstrated that audience preferences and needs, as ascertained through its research department, are incorporated into its program schedule. It is evident from McClatchy's record that it has been responsive to the local needs. *As for McClatchy, we need not look into such matters as local residence, civic participation, integration of ownership and management and diversity of background because its record speaks strongly in its behalf.* With regard to Telecasters, the local residence and the other factors are important from the long range point of view because these give assurance of continued insight into the area's needs and continued operation in the public interest. Thus, in evaluating McClatchy's past record for which it deserves preference and the other factors in which Telecasters has demonstrated superiority, we find that both give assurance that their television operation will be effectuated as represented and will remain aware of and sensitive to the needs of the communities. *However, in weighing McClatchy's outstanding record affirmatively demonstrating performance, against the presumptions gathered from Telecasters' integration of ownership with management, and other similar factors relating to the likelihood of effectuating its proposal, we believe McClatchy warrants a slight preference."* (R. 113-114) (Emphasis supplied.)

Contrary to the opinion below and the oppositions herein, it is wholly inaccurate to suggest that the Commission in any way justified its ultimate grant to Telecasters on the basis of Telecasters' supposed superiority in the areas of local ownership, integration of ownership and management or civic participation. Those factors, labeled by the Commission as merely presumptive, were weighed against petitioner's "outstanding record" of past broadcast performance, and petitioner

was awarded the "final" preference with respect to the reliability of effectuating its proposal and remaining alert to area needs (R. 114). Although several factors were discussed in this comparative area, only one preference was awarded and it was awarded to McClatchy.

Up to this point in the Commission's decision, there was only one preference awarded based upon the superiority McClatchy had demonstrated with respect to a number of factors. The Commission then considered the factor which it considered "to be determinative in this proceeding—diversification of the control of the media of mass communications" (R. 114). In sum, two final preferences were awarded[2]—one for reliability of effectuation of proposals and one for diversification. Since the first of these was awarded McClatchy, there can be no doubt but that Telecasters was awarded the grant solely because McClatchy has newspapers and broadcast interests.

In the only comparative area where a preference was awarded, save diversification, McClatchy was the recipient of that preference. Inasmuch as Telecasters received the award, McClatchy must have been denied because of its other mass media associations. Diversification was determinative. Indeed, according to the Commission's own decision, it was the only factor relied upon to support the grant.[3] This is obvious from the

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[2] Neither applicant was awarded a preference, rightly or wrongly, for its proposals (R. 106-107).

[3] In portions of its brief in opposition, the Commission effectively concedes that the sole justification for the award to Telecasters was the diversification issue. That brief states (pp. 4-5):

> "The Commission concluded that McClatchy's experience and record of performance gave slightly more assurance that its program proposals would be effectuated and that it would re-

Commission's ultimate conclusion, which reads as follows:

> "We conclude that under these circumstances the superiority McClatchy has demonstrated with respect to certain factors does not outweigh the comparative advantages adhering to Telecasters because of its freedom from ties with other radio, newspaper and television interests . . ." (R. 118)

In this conclusion only one area of advantage is suggested for Telecasters, *viz.*, its freedom from mass-media ties. Clearly, therefore, the issue presented in this case is whether the Federal Communications Commission, after a comparative hearing between two competing applicants for a television station, has the power to award the grant to one applicant on the sole ground that the other applicant has newspaper and broadcast interests.

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main responsive to the needs of the community than did Telecasters' superiority as to local ownership, integration of ownership and management, and civic participation (R. 113-114). *It found, however, that this slight advantage was greatly outweighed by Telecasters' substantial superiority in diversification of control of the media of mass communications (R. 118). Since in all other respects no choice could be made between the applicants, the Commission concluded that the public interest would be better served by a grant to Telecasters (R. 118).*" (Emphasis supplied.)

And it is further stated in that brief (pp. 10-11):

> "In the instant case, diversification assumed greater importance because of the relatively even balance of the two applicants with respect to the other pertinent criteria, and because of Telecasters' wide margin of superiority in the area of diversification."

See Petition 8 and 11-12, notes 7 and 13, respectively, in regard to the Commission's characterization of McClatchy's preferences as "slight".

Elsewhere in its opinion, the court below recognized the superiority of McClatchy in all respects but diversification, nevertheless it refused to properly review the question presented to it. By so doing, the lower court has put its stamp of approval upon a doctrine that was discriminatory in its inception and is even more so today. The decision of the court below permits diversification to be applied so as to defeat a superior applicant, without relating it to monopolization or even to over-concentration of broadcast control. As it is a wholly unreasoned and unexplained doctrine, it can be used like grapeshot by the agency. The agency's decision is wholly immune from attack because the discretion to use or not to use the doctrine is wholly unbridled.[4]

In *Scripps-Howard,*[5] the court below stated that the Commission could attach "significance" to the fact that one applicant is disassociated from existing media of mass communication in the area affected. This same court has now approved attaching "decisive significance" to diversification[6] and the further extension

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[4] See *Sunbeam Television Corporation* v. *Federal Communications Commission,* (U.S. App. D.C. Cir. No. 13180, decided March 14, 1957).

[5] *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission,* 189 F. 2d 677 (D.C. Cir., 1951), cert. denied, 342 U.S. 830 (1951).

[6] The Government's opposition erroneously contends (Opp. pp. 6-7) that no novel question is presented by the petition for certiorari "but only the correctness of the application of settled principles to the facts of this case." In support of this contention it cites *Scripps-Howard* and several appellate decisions (See Opp. n. 4). Suffice it to say that none of the cases cited stand for the proposition that the Commission can deny an otherwise superior applicant simply because of its mass-media associations.

was granted without any examination of the doctrine itself. Because the Commission's decision represented such an unwarranted extension of an already discriminatory doctrine, the American Newspaper Publishers Association felt compelled to appear in the court below as *amicus curiae,* urging reversal, and in this Court in support of the petition for certiorari. If the question presented for review is as stated by the oppositions, the American Newspaper Publishers Association would certainly not be in the case.

A pure question of law was framed for the court below. That court was mistakenly led into believing that the question set forth by petitioner herein was not, in fact, presented. The court unduly restricted its review due to this mistaken notion and thereby put its stamp of approval upon an unreasoned extension of an already discriminatory policy—a policy not based upon evidence of record and not shown to be related to the public interest.

In sum, the opinion below represents a dangerous extension of previous appellate court decisions touching the question presented, which extension is not in accord with previous pronouncements of this Court. The question presented for review is of tremendous importance to the future administration of the Communications Act. The opinion of the court below dangerously extends a policy which can be used arbitrarily to deny a superior applicant and results in depriving the public of the best possible broadcast service.

CONCLUSION

For the foregoing reasons, and those stated in the petition for certiorari, the petition should be granted.

Respectfully submitted,

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